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In The Supreme Court of the United States

October Term, 1984

MORRIS BRAND,

Petitioner,

-vs-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED FOR REVIEW

1. Is the predicate felony statute of New York (Penal Law 70.06) which mandates a sentence of imprisonment for a second felony offender violative of the Constitution of the United States in that it denies equal protection of the law under the Fourteenth Amendment and that it further amounts to cruel and inhuman punishment?

2. Was the defendant denied the effective assistance of counsel under the Sixth Amendment to the Constitution?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

MORRIS BRAND,

Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The defendant was tried by a Judge without jury in the Supreme Court, New York County and was convicted on October 5, 1983 of Criminal Possession of Stolen Property in the First, Second and Third Degrees (Penal Law 165.40, 165.45 and 165.50). The defendant, having previously been convicted of a Felony within a ten year period was sentenced under the predicate felony statute (Penal Law 70.06) to concurrent prison terms of two to four years, one and a half to three years, and a definite term of six months. The said Judgment of the Supreme Court of the State of New York was affirmed by an Order of the Appellate Division, First Department of the State Court, dated December 6, 1984, and an Order of the Court of Appeals, dated April 2, 1985 denied permission for leave to appeal to that Court. The defendant was at liberty pending his appeals but will be incarcerated on June 24, 1985.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3). It is argued that Section 70.06 of the Penal Law of the State of New York is unconstitutional under the provisions of the Fourteenth Amendment. Further, it is argued that defendant was denied effective counsel under the Sixth Amendment of the Constitution.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fourteenth Amendment, United States Constitution, which provides in part: Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Sixth Amendment, United States Constitution, which provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . and to have the assistance of counsel for his defense."

3. The Eighth Amendment, United States Constitution, provides that:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

4. Section 70.06 of the Penal Law of the State of New York, which provides:

"Sec. 70.06 SENTENCE OF IMPRISONMENT FOR SECOND FELONY OFFENDER

1. Definition of second felony offender.

(a) A second felony offender is a person, other than a second violent felony offender as defined in Section 70.04, who stands convicted of a felony defined in this chapter, other than a class A-I felony, after having previously been subjected to one or more predicate felony convictions as defined in paragraph (b) of this subdivision.

(b) For the purpose of determining whether a prior conviction is a predicate felony conviction the following criteria shall apply:

(i) The conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed;

(ii) Sentence upon such prior conviction must have been imposed before commission of the present felony;

(iii) Suspended sentence, suspended execution of sentence, a sentence of probation, a sentence of conditional discharge or of unconditional discharge, and a sentence of certification to the care and custody of the division of substance abuse services, shall be deemed to be a sentence.

2. Authorized sentence. Except as provided in subdivision five of this section, when the Court has found, pursuant to the provisions of the criminal procedure law, that a person is a second felony offender the Court must impose an indeterminate sentence of imprisonment. The maximum term of such sentence must be in accordance with the provisions of subdivision three of this section and the minimum period of imprisonment under such sentence must be in accordance with subdivision four of this section.

3. Maximum term of sentence. Except as provided in subdivision five of this section, the maximum term of an indeterminate sentence for a second felony offender must be fixed by the Court as follows:

(a) For a class A-II felony, the term must be life imprisonment;

(b) For a class B felony, the term must be at least nine years and must not exceed twenty-five years;

(c) For a class C felony, the term must be at least six years and must not exceed fifteen years;

(d) For a class D felony, the term must be at least four years and must not exceed seven years; and

(e) For a class E felony, the term must be at least three years and must not exceed four years.

4. Minimum period of imprisonment.

(a) The minimum period of imprisonment for a second felony offender convicted of a class A-II felony must be fixed by the Court at no less than six years and not to exceed twelve and one-half years and must be specified in the sentence.

(b) Except as provided in paragraph (a), the minimum period of imprisonment under an indeterminate sentence for a second felony offender must be fixed by the Court at one-half of the maximum term imposed and must be specified in the sentence.

5. Life probation. Notwithstanding any other provision of law the Court may sentence a person convicted of a class A-II felony or a class B felony defined in article two hundred twenty of this chapter to lifetime probation in accordance with the provisions of Section 65.00."

STATEMENT OF THE CASE

The defendant is a seventy-one year old man whose conviction arises out of the operation of a jewelry store on the Bowery in New York City by the defendant's older brother. The evidence indicated that the defendant worked two or three days a week and his arrest and that of his brother* follow upon the sale by the defendant of jewelry to a woman who identified the jewelry as having been stolen from her home in a burglary. The defendant was indicted with his brother, Isidore Brand, of multiple counts of Criminal Possession of Stolen Property and was convicted after a non-jury trial of Criminal Possession of Stolen Property in the First, Second and Third Degrees (Penal Law Sections 165.40, 165.45 and 165.50) and was sentenced to concurrent prison terms of two to four years, one and a half to three years, and a definite term of six months, respectively. None of the above convictions of themselves mandated imprisonment but because the defendant had previously been convicted of a felony in New York, the law (Penal Law Section 70.06) mandated the term of imprisonment. The defendant had in a

*Defendant's brother, who had no criminal record, pled guilty and has been sentenced to probation for five years.

separate case pleaded guilty on February 25, 1980 to the charge of Criminal Possession of Stolen Property and as such received the sentence of Probation. Upon his most recent conviction he received the two to four year term under the Predicate Felony Statute 70.06 of the Penal Law which mandates without exception that upon conviction of a felony in the State of New York the defendant must serve minimum and maximum periods of state imprisonment if he has had a prior felony conviction within a ten year period of his conviction.

Both the defendant and his brother Isidore had been represented by the firm of Goldberg & Cohen, Esqs. who practice as a partnership. Isidore Brand had been represented by Richard Goldberg, Esq. and Morris Brand by Steven Cohen. One day prior to trial Isidore Brand, by his attorney, Richard Goldberg, Esq., withdrew his plea of not guilty and interposed a plea of guilty to the indictment and was placed on probation. The trial then commenced January 20, 1983 with Mr. Richard Goldberg, who had represented Isidore Brand, requesting of the Court that he be allowed to assist in the defense of MORRIS BRAND, although the record on trial will demonstrate that Mr. Goldberg took over the entire defense of MORRIS BRAND. The Assistant District Attorney opposed this representation fearing a conflict of interest situation and a possible breach of attorney-client privilege. As a compromise situation, Mr. Cohen waived a jury for MORRIS BRAND and the case proceeded to trial. Mr. Cohen was present during the entire trial, but the trial was taken over by Mr. Goldberg. The defendant, as indicated, was convicted and sentenced.

The defendant, MORRIS BRAND, had previous to the trial suffered a stroke and still suffers from its side effects. In 1980 he was operated on for cancer of the colon,

and in 1981 underwent a prostate operation. In addition, he suffers from incipient senility. Moreover, his wife has cancer of the endometrium and requires his constant attention to her needs. A Motion was therefore made to set aside the verdict, both on the grounds that the verdict was against the weight of evidence, or, in the alternative, dismissing the indictment in the interest of justice. The Court denied both Motions.*

An appeal was taken to the Appellate Division of the Supreme Court, First Department, which unanimously affirmed the Trial Court on December 6, 1984 and by letter dated December 27, 1984 request was made for leave to appeal to the Court of Appeals. The Court of Appeals, also by Order dated April 2, 1985, denied permission to appeal.**

ARGUMENT

Section 70.06 of the Penal Law of the State of New York mandates, in effect, that if one has previously been convicted of a felony in the State of New York within a 10 year period of his present conviction, he must be sentenced to a minimum and maximum period of incarceration. The defendant had pled guilty to a prior charge in 1980. In being found guilty of the present charge, Judge Bell was forced to sentence him to a two to four year term of imprisonment. The Statute affords the Court no latitude but mandates imprisonment for a second felony offender. The defendant is a 71 year old male who, prior to his first conviction, never had a criminal record. He is a man who is in poor health, in a state of incipient senility and whose wife

*See Appendix for the September 29, 1983 Order of Justice Howard Bell.

**See Appendix.

is also a cancer victim. If in fact the defendant was not mandated to serve a prison term by the New York Statute, in all probability, the defendant would have been severely fined and alternate punishment substituted for the imprisonment sentence. In this case, the Court's hands were tied and the mandate of a two to four year imprisonment means that the defendant will probably die in prison. The cases that have attacked the Statute as resulting in a) cruel and inhuman punishment; b) violation of the Eighth Amendment of the Constitution have not been successful in the New York Courts and in the Federal District Courts and the Circuit Court of Appeals. *Dillard v. LaVallee,* C.A.NY 1977, 559 F2d 873. In *People v. Saxbury,* 1983, 95 A.D.2d 87, 464 NYS2d 43, the New York Court held the statute constitutional and in *People v. Owens,* 1977, 58 A.D.2d 587, 395 NYS2d 216, it was held that the section governing treatment of a second felony offender was not violative of the equal protection guarantees of the Constitution. *People v. Gonzales,* 1976, 54 A.D.2d 946, 388 NYS2d 336. In *People v. Sibley,* 1976, 54 A.D.2d 772, 387 NYS2d 487 the Court held that since all second felony offenders are treated alike, this Section providing for sentencing of all second felony offenders did not deprive these defendants equal protection of the law under the Constitution.

However, all defendants before the law are not alike. Surely, the sentence of two to four years of this elderly man is a cruel and inhuman sentence and violative of the Eighth Amendment. In the same manner that the Court struck down the death penalty in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726 as being arbitrary and without guidelines, so it should be determined that Section 70.06 of the New York Penal Law has no leeway and guidelines for its sentencing. A Court should be allowed to mitigate punishment where applicable and as Justice Brennan

stated in his dissent in *Gregg v. Georgia,* 96 S.Ct. 2909—a punishment must not be so severe as to be degrading to human dignity.

It is further argued that the defendant was not accorded the right to counsel as mandated by the Sixth Amendment of the Constitution and as elaborated in *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, the defendant and his brother, Isidore Brand, were each represented by one member of a two member law partnership. Isidore Brand was represented by partner A (Richard Goldberg, Esq.) and MORRIS BRAND, the Petitioner herein, by partner B (Steven Cohen, Esq.) One day prior to trial Isidore Brand, by his attorney, withdrew his plea of not guilty and interposed a plea of guilty to the indictment. On the following day, Richard Goldberg, Esq. requested of the Court that he be allowed to assist in the defense of the Petitioner at his trial. The Assistant District Attorney objected, fearing a conflict of interest and problems before a jury if in fact Isidore Brand testified at the trial, which actually occurred. To ameliorate this situation Mr. Cohen, with the Petitioner's consent, waived a jury and the case proceeded to trial. It is respectfully argued that defendant's right to counsel and to effective counsel under the Sixth Amendment embraced in the Fourteenth Amendment was invalidated by this action and the conflict of interest that occurred resulted in a denial of counsel. Petitioner's right to a jury was waived, at the behest of an attorney, and further the same attorney who now conducted his defense was limited in his questioning of defendant's brother, Isidore Brand, who was called as his witness. The right to effective cross-examination was compromised since it was MORRIS BRAND'S contention that the stolen property was purchased by his brother and not by him. The State Courts denied this point on appeal and

it is respectfully submitted that it was a violation of MORRIS BRAND'S Constitutional rights.

CONCLUSION

WHEREFORE, it is respectfully requested that the Petition for Certiorari be granted to review the Judgment of Conviction of MORRIS BRAND in the Supreme Court, New York County and a determination made to determine whether his Constitutional rights were violated and whether the Predicate Felony Statute of New York be determined to be unconstitutional.

Respectfully submitted,

HAROLD SCHWARTZ
Attorney for Petitioner

APPENDIX A—ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

MORRIS BRAND,

Defendant

Indictment No. 5969/81

BELL, J.:

Defendant, a 70 year old man, was convicted of numerous counts of Criminal Possession of Stolen Property in the First and Second Degrees, after trial before this Court without a jury. He now moves, pursuant to CPL §330.30 for an order setting aside the verdict as against the weight of the evidence, or, in the alternative, for an order dismissing the indictment in the interest of justice, pursuant to CPL §210.40. After due consideration, the Court must deny both motions.

The crimes for which defendant was convicted arise out of the operation of a jewelry store on the Bowery, by defendant's older brother, in which defendant admits to having worked two or three days a week. His arrest, and that of his brother*, follow upon the sale by defendant of jewelry to a women who identified the jewelry as having

*Defendant's brother, who had no criminal record, pled guilty and has been sentenced to probation for five years.

been stolen from her home in a burglary. After the arrests, the police removed jewelry valued in excess of $300,000 dollars from the store, and at the defendant's trial, more than 20 witnesses testified that jewelry found in the store had been stolen from their homes.

The thrust of defendant's argument, both at trial and on this motion to set aside the verdict, is that the evidence at trial was insufficient to establish beyond a reasonable doubt that defendant was aware that the property was stolen. The Court is convinced, albeit reluctantly, that the People sustained their burden of proof on this issue. Although it is unnecessary to rehash the evidence, the Court was impressed by the fact that the store in question had been operated for over 30 years by defendant, until his conviction two years ago of Criminal Possession of Stolen Property in the First Degree, for which he was sentenced to five years probation. Further, when the arresting officer entered the store, defendant, undoubtedly recognizing the officer as the same one who had arrested him previously, scooped up the tray of jewelry he was showing a customer (one of the persons whose stolen property was in the store), and attempted to hide it in the back of the store. This evidence, along with the totality of the evidence presented by the People, persuades this Court that the defendant's guilt of the crimes charged was proven beyond a reasonable doubt. Therefore, defendant's motion to set aside the verdict must be denied.

Defendant's motion to dismiss the indictment in the interest of justice presents a more difficult problem. Although none of the facts set out by defendant in his moving papers were unknown to him before trial, the Court has discretion, in the interest of justice, to entertain the motion at any time prior to sentence (CPL §255.10(1)). Due to defendant's age, and the fact that, having a prior

felony conviction he faces the imposition of a mandatory jail sentence, the Court will determine the motion on the merits at this time.

In addition to his age, the defendant has informed the Court that in 1971 he suffered a stroke and still suffers from its side-effects; in 1980 he was operated on for cancer of the colon; and in 1981 he underwent a prostrate operation. Moreover, his wife has cancer of the endometrium and requires constant medical attention. He asserts, with some force, that the interest of justice militates against sentenceing him to a mandatory two years in prison.

Motions to dismiss in the interest of justice are governed by CPL §210.40, which sets out ten "circumstances" which "the court must, to the extent applicable, examine and consider, individually and collectively. . ." in determining such motion (CPL §210.40 (1)). The seriousness and circumstances of the offenses (Subd. a) and the evidence of defendant's guilt (Subd. c) have been discussed above. The evidence reveals a "fencing" operation on a large scale and although defendant's crimes are "property crimes", in considering the seriousness of the offense, as well as the extent of harm caused by the offense (Subd. b), the Court cannot ignore the responsibility borne by those who, like defendant, make burglary and other larcenous crimes profitable and attractive by helping thieves dispose of their loot.

As to the "history, character and condition of the defendant", (Subd. d) other than the medical problems described above, the Court must consider the fact that defendant now stands convicted of the same crime for which he was placed on probation fewer than three years ago, when he was 68. Most of the problems he now raises existed then, and undoubtedly entered into the sentencing

court's decision to place him on probation. Neither his illnesses, nor his wife's, prevented defendant from engaging in the behavior which led to his arrests and convictions.

The last two relevant "circumstances"—"the purpose and effect of imposing upon the defendant a sentence authorized for the offense" (Subd. f), and "the impact of a dismissal upon the confidence of the public in the criminal justice system" (Subd g)—present the most difficult questions. The objections to sentencing a 70 year old man, in less than perfect health, to a prison term of 2 - 4 years are obvious, and the Court is very sympathetic to the plight of defendant's wife. However, the present situation is the result of a conscious choice by defendant. The consequences of his decision to again act as a "fence" for stolen property are, in view of his prior conviction, harsh. But these consequences were predictable before defendant chose to set in motion the events leading to his predicament. This is not the case of a man, who, after a period of honest living, finds an old conviction has come back to haunt him; defendant was still on probation when he returned to business. Such blatant disregard of the law, and of the consideration given him by the court cannot be countenanced. Undoubedtedly defendant felt that no court would be willing to send a man his age to prison, and so he could violate the law with impunity. Considering the impact of a dismissal on public perceptions of the criminal justice system, and at the risk of having the system appear vengeful, it must be made clear that no person has license to engage in criminal conduct. Having considered the relevant circumstances, the court is persuaded, reluctantly, that the interest of justice requires more than is present here before a lawful felony conviction may be set aside. Defendant's motion to dismiss the indictment in the interest of justice is denied.

It is so ordered.

Dated: New York, New York
September 29, 1983

J. S. C.

Howard E. Bell

APPENDIX B—ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 6, 1984.

Present—Hon. Francis T. Murphy, Presiding Justice,
Joseph P. Sullivan,
David Ross,
John Carro, Justices.

The People of the State of New York,
Respondent,

-against-

Morris Brand,
Defendant-Appellant.

Order of Affirmance on Appeal from Judgment
21615

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Howard Bell, J.), rendered on October 5, 1983, convicting him of criminal possession of stolen property in the first, second and third degrees, and said appeal having been argued by Harold Schwartz, of counsel for the appellant, and by Howard Bromberg, of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all

things, affirmed. The case is remitted to the Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

ENTER:
JOSEPH J. LUCCI
Clerk.

Counsel for appellant is referred to
§606.5, Rules of the Appellate
Division, First Department.

APPENDIX C—CERTIFICATE DENYING LEAVE

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. RICHARD D. SIMONS, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

MORRIS BRAND,
Appellant.

I, RICHARD D. SIMONS, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Rome, New York
April 2, 1985

s/ Richard D. Simons
Associate Judge

*Description of Order: Appeal from an order of the Appellate Division, First Department, dated December 6, 1984 which affirmed a judgment of Supreme Court, New York County (Howard Bell, J.), rendered October 5, 1983 convicting defendant of criminal possession of stolen property in the first, second and third degrees.

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No. 84-2012

In the

Supreme Court of the United States

October Term 1984

MORRIS BRAND,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK

Respondent.

On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, First Department

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 84-2012

In the Supreme Court of the

UNITED STATES

October Term, 1984

MORRIS BRAND,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

PRELIMINARY STATEMENT

On October 5, 1983, petitioner Morris Brand was convicted in the Supreme Court, New York County (Howard E. Bell, J.), after a non-jury trial, of Criminal Possession of Stolen Property in the First,

Second, and Third Degrees (New York Penal Law §§165.40, 165.45, 165.50). Petitioner was sentenced under New York's second felony offender statute, Penal Law §70.06, to concurrent prison terms of two to four years, one-and-a-half to three years, and six months, respectively.

By an order dated December 6, 1984, the Appellate Division, First Department, of the New York Supreme Court, unanimously affirmed the judgment of conviction. People v. Brand, 106 A.D.2d 206 (1st Dept. 1984). On April 2, 1985, the New York Court of Appeals denied petitioner's application for leave to appeal. People v. Brand, 64 N.Y.2d 1131 (1985). Petitioner began serving his sentence on June 24, 1985.

Petitioner now seeks a writ of certiorari to review the order of the Appellate Division, First Department.

STATEMENT OF THE CASE

On August 8, 1981, some 30 to 50 pieces of jewelry were stolen from the home of Elinor Deutsch. A few days later, Mrs. Deutsch saw one of the stolen pieces in a jewelry store. The piece was traced to the Magic Wheel Polishing Corporation, which was run by petitioner and his brother Isidore. On August 19, at

the behest of the police, Mrs. Deutsch visited petitioner's own store in Manhattan. He showed her 10 to 12 more pieces that had been stolen from her.

Armed with a search warrant, the police returned to petitioner's store on the following day and found approximately $300,000 worth of gold and silver pieces. In public showings held a few weeks later, owners identified more than one-third of this property. Although required by law to more entries for the purchase of these items, petitioner had not done so.

The Proceedings In The State Courts

Indictment Number 5969/81 charged petitioner and Isidore with the crimes of Criminal Possession of Stolen Property in the First, Second and Third Degrees. Petitioner was represented by Steven Cohen and Isidore by Cohen's partner, Richard Goldberg. Prior to trial Isidore, who had no previous convictions, pleaded guilty and was sentenced to probation.

Petitioner's non-jury trial commenced on January 20, 1983 before Justice Bell. Mr. Cohen was assisted by Mr. Goldberg in defending petitioner, and Isidore testified as a defense witness. On February 3, 1983, the judge found petitioner guilty on all three charges.

After trial, petitioner made a motion, pursuant to New York Criminal Procedure Law §210.40, to dismiss the indictment in the interest of justice. In his moving papers petitioner claimed that because of his age, his health problems, and those of his wife, it would be unjust to sentence him to a mandatory two years in prison. After denying the motion on September 29, 1983, Justice Bell sentenced petitioner as noted above.

In his appeal to the Appellate Division, First Department, petitioner argued inter alia that he was denied effective assistance of counsel because Mr. Goldberg, who aided in his defense, had represented Isidore in his guilty plea. Petitioner also maintained that Justice Bell should have dismissed the indictment in the interests of justice. By an order dated December 6, 1985, the Appellate Division unanimously affirmed the judgment of conviction without opinion.

On April 12, 1985, leave to appeal the order of the Appellate Division to the New York Court of Appeals was denied by Associate Judge Richard D. Simons.

The Instant Petition

Petitioner contends first that New York's second felony offender statute amounts to cruel and

inhuman punishment. In addition, petitioner argues that Messrs. Goldstein and Cohen had conflicts of interest which deprived petitioner of his right to effective assistance of counsel.

Reasons for Denying the Writ

1. Petitioner concedes that constitutional attacks on New York's second felony offender statute -- Penal Law §70.06 -- have failed repeatedly. See Dillard v. LaVallee, 559 F.2d 873, 874-75 (2nd Cir. 1977). Petitioner contends, however, that the statute, as applied to him, violates the Eighth Amendment because it contains no provision allowing the court to mitigate his sentence in light of his advanced years and accompanying illnesses.

This claim should be rejected summarily. Notably, petitioner can cite no case in which an elderly person successfully challenged a mandatory sentencing statute on the ground that he was too old to go to prison.* This is hardly surprising: if one 69

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*Petitioner's subsidiary claim -- that he is too sick to serve his sentence -- has no constitutional implications since New York provides for the removal of ill-prisoners to a hospital until they are sufficiently recovered to be returned to jail. New York Correction Law §508.

year-old were to escape punishment in this way, every other similarly-situated defendant would also have a valid claim. Although senior citizens undoubtedly are more law-abiding than other age groups, no one would suggest that they are immune from criminal process.

And here, petitioner's mandatory maximum sentence of two to four years was well deserved. Not only was his crime a very serious one involving stolen property worth more than $100,000, but he had committed his first felony only two years earlier at the age of 67.

Nor can petitioner advance his claim by referring to language drawn from capital punishment cases. This Court has stated that because a death sentence differs in kind from any sentence of imprisonment, decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of punishment in non-capital cases. And successful challenges to the proportionality of particular sentences in non-capital cases have been exceedingly rare. See Rummel v. Estelle, 445 U.S. 263, 272 (1980); Hutto v. Davis, 454 U.S. 370, 373 (1982).

2. Petitioner's claim that he was denied effective assistance of counsel by virtue of a conflict

of interest does not present any issues of merit that need be considered by this court. The question of whether petitioner's counsel, Mr. Cohen and Mr. Goldberg, made decisions at trial to petitioner's detriment because Mr. Goldstein still represented Isidore, is a factual one which should be left to the state courts.

When, as here, a defendant makes no objection to multiple representation, he must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Here, the record reflects no conflict at all.

To be sure, Isidore's lawyer, Mr. Goldstein participated at petitioner's trial. But since Isidore already had pleaded guilty and agreed to a negotiated sentence, it is unlikely that Mr. Goldstein felt any restraints in representing petitioner too. The one example cited by petitioner — Mr. Goldstein's direct examination of Isidore -- actually demonstrates the attorney's competence. Rather than attempting to minimize Isidore's role, Mr. Goldstein elicited from Isidore that he was in charge of the business and of purchasing the jewelry.

Petitioner's other allegation of conflict is that Mr. Cohen waived a jury trial just to make sure that Mr. Goldstein could participate. Once again, the record belies this claim. Petitioner's jury waiver met all the requirements of New York Criminal Procedure Law §320.10. It was signed by petitioner in person in open court and with the approval of the court. At that time Justice Bell questioned petitioner carefully about his decision to waive a jury trial in order to insure that the waiver was knowing and intelligent. Justice Bell then assured petitioner that he would decide the case "on the basis of the evidence" and not on the basis of any other information he may have learned during the proceeding. Petitioner suggests now that a jury might have acquitted a 69 year old man out of sympathy, but a jury is not supposed to decide a case out of sympathy, and the refusal of the court to do so cannot be ascribed to ineffective assistance of counsel or conflict of interest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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